different question; namely, "May the vendor derogate from his grant"? which of course can be answered only in the negative. (Cf. *Hutchinson* v. *Nay, supra,* p. 265, where this statement of the question is attributed, apparently erroneously, to the case of *Webster* v. *Webster,* 180 Mass. 310). The Massachusetts court in the principal case makes it perfectly plain in what respect it differs from the English courts. In England "a competing business always can be set up by one who has sold his good will. * * * And a purchaser of good will gets nothing more than the right to have the vendor refrain from soliciting customers of the old firm." In Massachusetts on the other hand, "no competing business may be set up if it derogate from the grant of the good will of the old business." Furthermore in Massachusetts the question as to whether the acts of the vendor do or do not derogate from the grant is not a question of law to be settled by any specific "rule," but is in all cases a question of fact for the jury, the Massachusetts court reiterating in this particular the doctrine laid down in its own recent cases of *Foss* v. *Roby, supra,* (Cf. 6 MICH. L. REV. 93), and *Old Corner Bookstore* v. *Upham,* 194 Mass. 101. We have thus one more demonstration of the futility of rules of law as a means of settling these hard questions, and a further illustration of the tendency of the courts to throw the burden on the jury in the actual trial of the specific case. J. H.D.

ATTACHMENTS ON UNLIQUIDATED DEMANDS.—If the creditor should not have the aid of attachment to recover on unliquidated demands, why not? It is true that attachment as a security for the satisfaction of the judgment that may be recovered in an action pending or just commenced was unknown to the general common law of England, and existed only in a restricted form as a special custom of London and other places in the form of garnishment till it was introduced into the New England colonies by an early statute of Massachusetts, whence its utility commended it so that it was soon adopted in all the colonies. Therefore, it may be said that if there is no authority for attachment on unliquidated demands under the statute there is no authority at all—that the proceeding is purely statutory, and authority must be found in the statute for each case.

But this argument does not apply to the point now under discussion under any of the statutes so far as we are aware; for whether the statute permits attachment "in any action on contract," or "in any action for the recovery of money only," or "in any action for the recovery of damages," which are some of the most common statutory forms of expression, actions for unliquidated damages are as much included within the terms of the statutes as actions on liquidated demands. This argument, when applied to this class of cases works to the opposite conclusion. The argument when applied to this class of cases would be, that it is for the legislature to say what cases they will extend the new remedy, and it is not for the court to deny it if the legislature has given it, though inconvenience may follow. The fact is that this old stock argument against attachments and garnishments in all debatable cases never was much heard on this class of cases. Why then has not

the remedy been allowed on unliquidated demands generally? Should we not rather say, remedial statutes should be so construed as to advance the remedy?

The rule that attachment does not lie in aid of suits on unliquidated demands was first declared in the case of *Fisher* v. *Consequa,* 2 Wash. C. C. 382, Fed. Cas. No. 4816, by Justice WASHINGTON in the circuit court of the United States for the district of Pennsylvania, in 1809; and was occasioned by the fact that the statute under which the attachment issued in that case allowed the remedy only to recover a *debt;* and in disposing of the question Justice WASHINGTON said: "It must be admitted, that, according to a strict and literal construtcion of the act of assembly, the foreign attachment is confined to cases of debt. * * * What is a debt? In strict law language, it is a precise sum due by express agreement, and does not depend upon any after calculation to ascertain it. The remedy for recovery of it is by action of debt, and frequently by action of *indebitatus assumpsit.* But is this the only case within the mischief intended to be remedied by the law? * * * The uncertainty of the sum due, does not, in the common understanding of mankind, render it less a debt. A promise, whether express or implied, to pay as much as certain goods or labor are worth, or as much as the same kind of goods may sell for on a certain day, or at a certain market; or to pay the difference between the value of one kind of goods and another, creates, in common parlance, a debt; and the person entitled to performance does not speak of his claim as for damages, but for a debt, to the amount which he considers himself entitled to. But it is not every claim that, upon a fair construction of this law, or even in common parlance, can be denominated a debt. For, in the first place, the demand must arise out of a contract, without which no debt can be created; and the measure of the damages must be such as the plaintiff can aver by affidavit to be due; without which, special bail (which the defendant, by giving, may dissolve the attachment) cannot regularly be demanded. It follows from this that a foreign attachment will not lie for demands which arise *ex delicto,* or where special bail cannot be required." And therefore it was held that the attachment was proper in that case, which was for delivering tea inferior to contract.

It will be observed that the court in this case gave a very liberal interpretation to the statute, and in fact stretched it to cover the case. Thus the law stood for ten years; when he case of *Clark* v. *Wilson* (1819), 3 Wash. C. C. 560, Fed. Cas. No. 2841, came before the same court and judge, under the same statute; and in this case the court held that the statute could not be extended to sustain an attachment in an action for damages for refusal to employ plaintiff's ship on a voyage to Montevidio at £670 per month or fraction thereof; and in referring to *Fisher* v. *Consequa* in that case, Justice WASHINGTON said: "The principle decided in that case was, that a demand arising *ex contractu,* the amount of which was ascertained, or which was susceptible of ascertainment by some standard referable to the contract itself, sufficiently certain to enable the pliantiff by affidavit to aver it, or a jury to find it; might be the foundation of a proceeding by way of foreign attachment, without reference to the form of action, or to the technical

definition of debt, the expression used in the law. * * * This then, is a case, in which unliquidated damages are demanded, in which the contract alleged as the cause of action affords no rule for ascertaining them, in which the amount is not, and cannot with propriety be, averred in the affidavit, and which is and must be altogether uncertain until the jury have ascertained it, for which operation no definite rule can be presented to them." This is the rule that has been declared since in the courts that have held attachment not to lie on unliquidated demands. Thus a rule laid down in giving a liberal construction to a narrow statute has been applied in giving a strict construction in the face of the express words of statutes which warranted no such limitation. The decisions on the question are very numerous, and in nearly or quite half of the states, a rule has been established as above stated without anything in the statute to warrant the limitation. In a few states it is squarely held that the fact that the demand sued on is not for liquidated damages is no objection to the attachment, since the judge can limit the amount to such sum as he deems reasonable.

In Michigan the rule laid down in the case of *Clark* v. *Wilson* was recognized but held not applicable, in the early case of *Roelofson* v. *Hatch,* 3 Mich. 277; and in the recent case of *Showen* v. *J. L. Owens Co.* (Oct. 4, 1909), — Mich. —, 122 N. W. 640, the court has again recognized the rule, and again held it inapplicable, sustaining an attachment in an action for damages for breach of warranty of machinery as sound and suitable for a purpose. J. R. R.

WILL A MARRIAGE, BIGAMOUS IN INCEPTION, BECOME VALID AFTER THE DEATH OF THE UNDIVORCED SPOUSE?—In a recent decision the supreme court of Oklahoma held that a marriage, both parties to it knowing that the husband had a living and undivorced spouse, did not ripen into a valid common law marriage after the death of the undivorced spouse, though both parties knew immediately of the death and afterwards continued to live together as husband and wife and were so recognized in the community in which they lived. There appeared to be no divided repute in the community as to their relationship. *Clark et al* v. *Barney et al.* (1909), — Okl. —, 103 Pac. 598. The decision is based upon the ground that public policy forbids the recognition of such a marriage, as tending to place a premium upon a disregard of the sacred nature of the marital relation.

A continuation of a meretricious cohabitation raises no presumption of a legal marriage. Slight circumstances, however, are sufficient to show a change in the minds of the parties raising the presumption of marriage. BISHOP, MARRIAGE, DIV. & SEP., §§ 964 & 965. Supported by *Hyde* v. *Hyde,* 3 Bradf. Sur. 509; *Gall* v. *Gall,* 114 N. Y. 109. And this is so, although the circumstances fail to show when or how the change from concubinage to matrimony took place, if the circumstances show that such a change has taken place. *Caujolle* v. *Ferrié,* 23 N. Y. 90; *Badger* v. *Badger,* 88 N. Y. 546, 42 Am. Rep. 263.

The following cases have held that where a disability exists, if the parties desire marriage and do what they can to make the relation matrimonial,